UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,
Plaintiffs,
v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, et al.,
Defendants.

BRIEF REGARDING *IN CAMERA* REVIEW OF COMMUNICATIONS BETWEEN LEGISLATIVE STAFF AND COUNSEL FOR THE LEGISLATURE

In compliance, with the Court's February 14, 2012 Order (Dkt # 155), counsel for the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald (the "Legislature"), file this brief to provide the basis for the Legislature's belief that the communications at issue are subject to the attorney-client privilege.

As the Court is aware, the subpoenas at issue have been the subject of the past discovery disputes. Those disputes generated three orders from the Court. (Dkt## 74, 82 & 104). Those Orders directed the Legislature to produce certain documents it had withheld and to make Mr. Ottman, Mr. Foltz and Mr. Joe Handrick available for additional depositions. The Legislature sought to fully comply with those Orders. Continued depositions were scheduled and conducted. All documents previously withheld on legislative privilege grounds were produced. No documents were withheld by Joe Handrick on the basis of any privilege. The only documents not produced were limited to communications solely between counsel and client. Those documents are in dispute and have been provided to the Court under seal.

It is the position of the Legislature that none of the Orders nullified the attorney-client privilege as it relates to communications between counsel and client. Thus, provided the documents at issue fall within the scope of the attorney-client privilege, the Legislature's position is that it need not produce such communications, absent an order from this Court.

The Seventh Circuit has stated that the attorney-client privilege protects communications between lawyer and client "made in confidence by a client to his attorney for the purpose of obtaining legal advice." *See U.S. v. Weger*, 709 F.2d 1151, 1154 (7th Cir. 1983). Additionally, the attorney-client privilege protects "communications that tend to directly or indirectly reveal a client confidence." *Evans v. Chicago*, 213 F.R.D. 302, 312 (N.D. Ill 2005).

I. The First Order.

The Court's First Order dealt primarily with two issues; the applicability of the attorney-client privilege to communications involving Joe Handrick and the applicability of the legislative privilege. (Dkt. #74). While, the Court held "the attorney-client privilege has no application to the communications of the Legislature and Mr. Handrick," it continued: "to be sure the attorney-client privilege protects communications from a client to an attorney who is acting as an attorney." (Id. at 3). The Court also held that the legislative privilege was inapplicable and instructed the parties to "read very carefully" *Comm. for a Fair & Balanced Map v. Ill. State. Bd. of Elections*, No. 11-CV-5065, 2011 U.S. Dist. Lexis 117656 (N.D. Ill. Oct. 12, 2011). (Id. at 4-6). Notably, that court dealt only with the legislative privilege and it noted that its decision "does not foreclose" an assertion of the attorney-client privilege. *Balanced Map.*, at *36, n.10.[1]

[1] The Court also instructed the Baldus plaintiffs to cure certain defects in the Subpoenas. The Legislature did raise the issue of attorney-client privilege in its motion to quash the subpoena served on Mr. Ottman; however, the Court did not address that issue in its Order.

II. The Second Order.

The Legislature moved for clarification of the First Order and the Court issued its Second Order in response. The Court reiterated its holding that Mr. Handrick's opinions, conclusions or communications are not "subject to any work-product or attorney-client privilege." (Dkt# 82 at 2-5). This Second Order dealt exclusively with the application of privileges with regard to Mr. Handrick. The Court also clarified that Mr. Handrick's communications with counsel for the Legislature were not covered by the attorney-client or work product privileges. (Id. at 5-7.) In this discussion, the Court noted that advice on political, strategic or policy issues would not fall within the scope of the attorney-client privilege. (Id. at 6 citing *Evans v. Chicago*, 213 F.R.D. 302, 312 (N.D. Ill 2005)).

III. The Third Order.

Mistakenly believing that First and Second Orders were orders of a single judge and not the entire panel, the Legislature moved for review by the full Court. In response, the Court issued its Third Oder. With regard to privileges, the Third Order deals only with the privileges related to documents, information or communications involving Joe Handrick. (Dkt # 104 at 1-8). The Court reiterated that "the three-judge panel declines to hold that Mr. Handrick or any of his documents are entitled to any of the privileges being asserted." (Id. at 8).

IV. Discovery To Date And The Documents At Issue.

In light of the Orders, all responsive documents in Mr. Hendrick's possession, custody or control have been produced and Mr. Ottman and Mr. Foltz have produced all responsive documents, except those that are the subject of this *in camera* review. All three have now been deposed twice. All of the documents withheld from production are email communications between lawyer and client inclusive of attachments related to the facilitation of advice.

While the Legislature believes that the communications submitted relate to the facilitation of legal advice concerning redistricting, it is mindful of the *Evans* case and understands that the Court could view certain of the emails as falling outside the attorney-client privilege under the "political, strategic or policy" exception. However, the Legislature is in a bit of conundrum on this issue. Voluntarily disclosing attorney-client communications without a court order may result in waiver of an existing privilege. Counsel for Voces de la Frontera has made that position clear, asserting that production of any documents reflecting communications between counsel and the Legislature constitutes a waiver of attorney-client privilege over all communications related to that subject matter. (*see* attachment A). If the Legislature were to produce attorney-client communications that might be characterized as political rather than legal advice, the Legislature would find itself facing a motion to compel from Voces de la Frontera asserting that the Legislature has waived the attorney-client privilege. Moreover, if the Legislature erred on the side of production, the Legislature may in fact waive its existing attorney-client privilege. However, if this Court were to order the production of certain communications as falling outside the scope of the attorney-client privilege, the issue of waiver would be alleviated.

Moreover, in light of the *Evans* decision's reference to "political" advice, the Legislature's task of analyzing whether to withhold specific communications on grounds of the attorney-client privilege is particularly difficult. Here, the underlying legal engagement involves the provision of legal advice concerning the drafting of redistricting legislation that complies with relevant legal standards. The legislative process is inherently political. Yet, that does not automatically render the provision of legal advice designed to ensure that legislation complies with the constitution and Voting Rights Act advice which is political in nature. That is true whether a

particular communication involves counsel explaining the relevant legal standards to the client, or relates to matters relevant to demonstrating that a proposed redistricting bill complies with those legal standards -- such as the use of expert analysis or the necessity of including certain evidence or testimony in the legislative record. Respectfully, the Legislature does not believe that the fact that legislative redistricting is a political process eliminates the attorney-client privilege with regard to communications between attorney and client that seek, offer, or provide legal advice on redistricting issues. *See Doe v. State of Nebraska*, 788 F. Supp. 2d 975, 978-79, 986-87 (D. Neb. 2011) (in a case involving a constitutional challenge to a Nebraska statute, the court acknowledged that the attorney-client privilege could apply to certain communications between legal counsel and State defendants related to the drafting and enactment of the statute, although the court could not evaluate the applicability of the privilege to any specific documents because the defendants had not provided opposing counsel or the court with a privilege log).

In short, we believe the present approach, agreed to by counsel for the Baldus plaintiffs and the Legislature, is the most appropriate means by which this issue can be resolved without further motion practice. The Legislature has not sought to improperly withhold any responsive documents. Rather, it has sought in good faith to preserve the attorney-client privilege. [2]

Pursuant to the Court's February 14th Order, the withheld documents have been filed under seal. That submission contains: a) 84 emails identified on an enclosed privilege log; and, b) 2 email chains that were previously produced in redacted form and were used as deposition exhibits. These chains are produced in both redacted and non-redacted form.

[2] The Legislature also considered seeking an agreement from the Baldus plaintiffs that would allow their counsel to review the documents withheld on the grounds of attorney-client privilege pursuant to F.R.E 502 (allowing parties to agree that the disclosure of privileged material does not constitute a waiver of the privilege). It was the Legislature's hope was that such an agreement might limit the scope of, or avoid all together, any motion practice over the withheld documents. However, unless it is incorporated into a Court order, such an agreement is only binding on the signatories. See F.R.E. 502(e). Given the multitude of parties in this case, and the stated position of Counsel for Voces de la Frontera, the Legislature realized that this option would not provide an avenue to resolve this dispute without involving the Court.

Dated this 14th day of February, 2011.

MICHAEL BEST & FRIEDRICH LLP

By: /s/ Joseph Louis Olson

Eric M. McLeod, SBN 1021730
emmcleod@michaelbest.com
Joseph Louis Olson, SBN 1046162
jlolson@michaelbest.com
Aaron H. Kastens, SBN 1045209
ahkastens@michaelbest.com
100 East Wisconsin Avenue, Suite 3300
Milwaukee, Wisconsin 53202-4108
Telephone: (414) 271-6560
Facsimile: (414) 277-0656

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